

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Carriage of the Transmissions)
of Digital Television Broadcast Stations)

CS Docket No. 98-120

COMMENTS OF COURTROOM TELEVISION NETWORK

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June 11, 2001

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Executive Summary

Court TV is heartened by the FCC's tentative rejection, in the Report and Order and Further Notice of Proposed Rulemaking ("*Further Notice*") in this proceeding, of simultaneous carriage rights for each broadcaster's analog and digital signals during the digital television ("DTV") transition. That the Commission reached this conclusion reflects its apparent recognition that such dual carriage would be unfair, anti-competitive, and unlikely to withstand constitutional scrutiny.

A dual must carry requirement would be profoundly anti-competitive. Broadcasters already are guaranteed carriage for their analog signals, but cable programmers such as Court TV must incur substantial marketing and transactional costs just to earn the opportunity to gain access to limited cable capacity, and they must then often pay for carriage. It would be inequitable to give broadcasters a second free ride for their digital signals (and new opportunities for additional retransmission tying arrangements), while cable programmers are demoted to third class citizenship.

None of the public policy goals of analog must carry from the 1992 Cable Act would be furthered by dual DTV must carry. Congress and the Commission performed a delicate balancing act in supporting analog must carry based on specific policy goals set forth in the Act's legislative history. But no similar findings support digital must carry, and a dual carriage requirement would not advance any of the government interests advanced for analog must carry. Dual carriage will not protect vulnerable broadcasters because it will double the number of stronger

stations that cable operators may choose from to reach their must carry limit. It will not promote diversity, as limited cable system capacity will lead cable operators to drop existing non-broadcast programming to fulfill their must carry requirements; the number of speakers will shrink, as will the amount of information provided given DTV's obligation to duplicate analog programming. DTV dual carriage also would not promote competition for the reasons set forth above. And, even if it were permissible for the FCC to suggest policy goals different from those relied upon to uphold must carry's constitutionality, such as hastening the DTV transition, dual carriage would be no more successful in materially advancing those government interests than it would be in advancing those specified by Congress.

Court TV's programming, and its public interest efforts in particular, are every bit as valuable as analog broadcaster fare (if not more so), and they surely exceed that of DTV, which at best during the digital transition will merely duplicate analog programming. There is nothing inherently superior, or of greater public interest value, about broadcast programming to warrant granting DTV the numerous competitive and regulatory advantages dual carriage would entail. More importantly, even if there were, such a content-based preference could not withstand constitutional scrutiny. Whatever DTV interests the FCC seeks to advance must be achieved within the confines of the First Amendment. A dual carriage requirement fails this test for a variety of reasons, including the fact that it would fail to promote the policy goals underlying the Act's must carry provisions.

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COMMENTS OF COURTROOM TELEVISION NETWORK

Courtroom Television Network LLC (“Court TV”) hereby submits comments on the *Further Notice of Proposed Rulemaking* in the captioned proceeding (“*Further Notice*”). 1/ In Court TV’s initial comments in this proceeding, we urged the FCC to find ways to promote the development of digital broadcasting other than giving broadcasters an additional preference – on top of that already conferred by analog must carry – in the form of government-mandated carriage for their digital signals. We explained that the public interest calculus is fundamentally different for digital must carry than it was in the analog context, that the Cable Act does not authorize duplicative FCC must carry requirements, and that

1/ *Carriage of Digital Television Broadcast Stations*, FCC 01-22, CS Docket No. 98-120 (rel. January 23, 2001).

digital must carry rules would fly in the face of the purposes of the Cable Act of 1992 and the First Amendment. 2/

Court TV is heartened to see that the *Further Notice* adopts some of the analysis set forth in our Initial Comments. We agree with the FCC's tentative conclusion not to require dual carriage of broadcasters' analog and digital signals during the digital television ("DTV") conversion, because dual carriage would burden First Amendment interests substantially more than is necessary to further the government's stated interests. *Further Notice*, ¶¶ 3, 112. Court TV would like to believe that the recognition of those core constitutional principles reflects an appreciation of how unfair, anti-competitive and counterproductive a dual carriage requirement would be.

In these comments, Court TV focuses on the severe disadvantages cable programmers would experience in the face of a dual carriage requirement. We first demonstrate that, in the current video programming marketplace, elevating DTV to preferred must carry status would strike a crippling blow to cable programmers and would yield no public interest benefit. We then show that, in

2/ See Comments of the Courtroom Television Network on *DTV Must Carry NPRM*, 13 FCC Rcd 15092, filed October 13, 1998 ("Court TV Initial Comments") at 2-6 (public interest calculus differs); 6-8 (Cable Act does not support using must carry to support duplication of broadcast signals); 9-10 (statutory and constitutional arguments).

view of these detrimental effects, preferential carriage for digital broadcast signals cannot withstand public policy or First Amendment scrutiny.

I. AN FCC GRANT OF FULL SIMULTANEOUS BROADCAST RIGHTS WOULD BE PROFOUNDLY ANTI-COMPETITIVE

Court TV submits that the dual must carry demand made by the broadcast interests in this proceeding is unjustified by the realities of the video programming marketplace and is overreaching. The broadcasters have sought digital carriage as a matter of right, without regard to whether there is even demand in the market for their programming. For example, the National Association of Broadcasters (“NAB”) has argued that “the terms of Congress’ must carry law apply, without distinction, to *every* local commercial television signal” and that the Commission is “bound by Congress’ findings and conclusions with regard to must carry, and cannot re-consider the bases *or need* for must carry protections [for] ‘new’ signals.” NAB Initial Comments at 2-3 (initial emphasis in original, other emphasis added). In its petition for reconsideration of the Report and Order accompanying the *Further Notice*, NAB goes even farther, suggesting that the FCC should revise the Act to confer carriage priority first to one signal of every local broadcaster. NAB/MSTV/ALTV Petition for Reconsideration and Clarification at 17.

The broadcasters’ drive for maximum carriage of their digital signals derives in large part from the competitive benefits that must carry status confers.

For example, broadcasters whose signals are entitled to must carry status do not have to incur the costs of marketing their programming to prospective viewers and cable operators. Nor must they concern themselves with maintaining programming that is sufficiently valued in the marketplace to ensure continued delivery via cable. Yet cable programmers, except those supported by retransmission consent leverage, have to prove their value continually through program investments and marketing measured against daily ratings and other cable channels competing for valuable channel positions and distribution. In addition, broadcast stations entitled to must carry status must be provided on a separately available basic service tier to which subscription is a threshold requirement to receive any cable service (unless the cable operator is subject to effective competition). ^{3/} Broadcasters that enjoy a must carry preference are also never required to pay for carriage, and in fact are statutorily barred from doing so. *See* 47 U.S.C. § 614(b)(10).

Conversely, the regulatory and marketplace realities facing cable operators and cable networks are entirely different. Cable operators must pay local franchising authorities for the use of rights-of-way, while broadcasters were “loaned” spectrum valued at \$70 billion (over and above their existing allocations of free spectrum) to establish DTV service. At the same time, the cable industry has

^{3/} 47 U.S.C. § 543(b)(7)(A); *see also Further Notice*, ¶ 101. Although it is proposed that cable operators be allowed to offer the DTV signals they carry subject to retransmission consent on a digital tier, *see id.*, ¶ 132, this flexibility would not extend to must carry signals.

invested billions of dollars in developing digital transmission capability, 4/ while broadcasters are seeking a free ride on that platform.

A similar inequity exists on the programming side. While the Cable Act prohibits payment for broadcast carriage, many cable networks, including Court TV, have no choice but to respond to marketplace realities by paying per-subscriber marketing support and launch fees to obtain carriage under affiliation agreements with major multiple system operators (“MSOs”). For example, Court TV has entered into affiliation agreements with some of the larger MSOs that require payment of upwards of several dollars per subscriber for carriage, plus marketing support designed to maintain Court TV’s viability in an increasingly competitive cable program market. 5/ In addition, Court TV must compete for carriage (and placement on the preferable basic tier), against other programmers who can leverage – and have leveraged – the retransmission rights of their broadcast affiliates to gain access. While the most notable example of such arrangements is

4/ See Comments of the National Cable & Telecommunications Association on the *Further Notice*, filed June 11, 2001, at 18-19 (noting that “[c]able operators have spent billions of dollars to increase capacity,” including “200 MHz in added capacity [for] new video and non-video digital services,” such as digital video, high definition programming, Internet services, pay-per-view, video-on-demand, telephony, digital audio, and interactive television).

5/ Over last 3 years, Court TV has entered into affiliation agreements that have increased our penetration to an additional 30 million subscribers. However, in order to reach these additional subscribers Court TV has agreed to a variety of financial inducements valued over the terms of such agreements at \$750 million (including launch/marketing support and varying free carriage terms).

the ABC-Disney-ESPN affiliation, 6/ it is by no means a unique phenomenon. 7/ In such a regulatory environment, any added mandates that create preferences for favored programmers weigh heavily on networks that must compete for carriage in the open market. In view of the disadvantages suffered by cable programmers vis-à-vis broadcasters in any must carry regime, the wider the protective must carry cloak is spread, the more non-competitive the video programming marketplace becomes.

There can be no serious question that the preferred status must carry confers carries with it not only the above competitive ramifications, but constitutional ones as well. Even in upholding analog must carry, the Supreme Court recognized the significant burdens imposed on cable programmers. *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 645 (1994) (“*Turner I*”) (“Broadcasters, which transmit over the airwaves, are favored [in a must carry scheme], while cable

6/ See, e.g., *The Tangled Vines of TV Ownership*, CABLE WORLD at 12 (January 15, 2001) (noting that Disney, in seeking carriage for its numerous cable offerings, may use as “bargaining chips” its ownership of the ABC television network’s owned and operated stations, as well as the ESPN networks); Paul Kagan Associates, Inc., CABLE PROGRAM INVESTOR at 8 (March 17, 2000) (recounting Disney/ABC efforts to condition retransmission of Houston affiliate KTRK on basic carriage of the Disney Channel, Toon Disney and SoapNet).

7/ Mavis Scanlon, Phillips Business Information, Inc., *Retrans Insanity: NBC Wraps Up Olympics*, CABLEFAX (September 6, 2000) (discussing retransmission tying deals involving the Olympics and MSNBC and CNBC); cf., *Further Notice*, ¶ 34 (discussing the need for the FCC “to monitor . . . potential anticompetitive conduct by broadcasters” that enjoy retransmission consent bargaining power to ensure they do not “harm [cable interests] or subscribers [through] tying arrangements”).

programmers, which do not, are disfavored.”). As we demonstrate below, whatever constitutional and public policy merit analog must carry may have had, it does not translate into the digital context to support a dual carriage requirement.

II. PREFERENTIAL CARRIAGE CANNOT BE JUSTIFIED BASED ON THE INTERESTS UNDERLYING ANALOG MUST CARRY

Broadcasters make much of the claim that the public will be deprived of the benefits of the digital transition if the Commission fails to mandate dual must carry. But what does this mean, either to television viewers, or to the legal and policy issues underlying this proceeding? Broadcasters seek government protection and mandated carriage for channels and content that remains speculative as against existing cable program channels that are required to prove their value in the marketplace each day. Even when available, broadcast digital channels would seek to escape from such marketplace testing and valuation, looking instead for the protection of government mandates. Must carry proponents cannot seriously assert that viewers would lose valuable programming if the Commission does not grant dual carriage rights. As a factual matter, the opposite is true – must carry would displace valuable programming that serves public needs and interests. More importantly, any such claim about the “value” of digital broadcast programming as a justification for must carry would doom any argument about the rules’ constitutionality. As explained below, no case can be made to support dual DTV must carry based on the governmental interests identified by Congress.

Congress walked a fine line in adopting a regime for analog must carry. The carriage requirements were enacted on the theory that broadcast programming is inherently valuable to the public, but without regard to the actual programming content. The Supreme Court narrowly upheld analog must carry requirements as being content-neutral, but under the particular circumstances of traditional analog broadcasting. For example, the *Turner* majority found a government interest in promoting the “continued availability of such free television programming, *especially for viewers who are unable to afford other means of receiving programming.*” *Turner I*, 512 U.S. at 646 (emphasis added). According to the Court, analog must carry was needed “to ensure that all Americans, *especially those unable to subscribe to cable*, have access to free television programming – whatever its content.” *Id.* at 649 (emphasis added). There simply was no occasion for the Court to weigh the legality of carriage rules predicated upon speculative programming benefits that might come from new high-end television services.

The one point on which a majority of the Court agreed, was that any must carry regime justified by the value of the programming itself would be presumptively invalid. *Id.* at 644-646; *see also id.* at 678-681 (O'Connor, J., concurring in part and dissenting in part). To whatever extent the Commission in this proceeding is willing to weigh the “value” of DTV service in the abstract, it should also be aware of the valuable cable programming that will be threatened by any must carry regime.

In our case, Court TV has shown a long-standing commitment to public interest programming. Court TV's core mission is to serve as a network dedicated 7-days-a-week to opening a window on the American justice system. It is the first and only cable network dedicated to the full panoply of the criminal justice system, the investigative process and justice, featuring a daytime schedule rich with live trials, legal commentary, news on law-related topics, and programming concerning crime and its impact on society.

One example of Court TV's programming that both entertains and makes the criminal justice system more understandable and accessible to the viewing public is the daily "Crier Today" talk program, featuring noted journalist and former judge Catherine Crier. "Crier Today" is devoted to discussing topical news and stories related to legal and criminal justice issues. Another example is "The System," which presents compelling documentaries on a wide range of issues originating both in trials and broader areas of concern, including the causes of crime and how American society responds to it. Court TV has also produced and aired series like *Greatest Trials of all Time*, a series of documentaries on major trials in history. 8/

8/ Other original Court TV programs have included *Verdicts and Justice*, a retrospective analysis of the most critical and dramatic cases in America's courtrooms; *Lock & Key*, which examines the fate of convicted prisoners through a review of sentencing, parole and death penalty hearings; and *Instant Justice*, which covers proceedings in municipal and night courts from across the country.

Court TV's public affairs efforts also feature its work with Cable in the Classroom, the National Middle School Association, and the nation's leading cable companies to produce a broad-based public service initiative aimed at young adolescents called *Choices and Consequences*. This initiative spotlights the issues facing 10- to 15-year-olds as they make pivotal decisions during the transition from childhood to adolescence, particularly in the context of avoiding violence.^{9/} The curriculum also includes a community outreach component entitled *Your Turn*, which brings together teens and high-profile community leaders to discuss legal and social issues of significance to the community. *Your Turn* has traveled to over 40 communities and produced programs on such topics as gang violence, weapons in school, public prayer, and teen substance abuse.

Court TV's extensive public affairs and educational efforts have been well-received and awarded the cable industry's highest honors for public affairs programming. In a national survey of high school teachers by Malarkey-Taylor Associates, when asked about Court TV's importance and educational value, teachers noted how the network allows students to see the justice system in action, helps them understand many aspects of the law, constructively presents current

^{9/} For its *Choices and Consequences* and other Cable in the Classroom programs, Court TV produces teacher's guides that suggest issues to be discussed both before and after viewing a *Choices and Consequences* program.

issues of social interest, and focuses on justice being served. ^{10/} Court TV engages in the above efforts *despite having no regulatory obligation to do so*, in marked contrast to broadcasters, whose efforts directed at children and the public interest are often offered under obligations imposed by the Commission's rules. Recently, Court TV was asked by the cable systems serving San Diego, California to come into a community suffering from the tragic effects of yet another incidence of school violence, and produce a *Your Turn* town meeting where important issues could be discussed and the voices of the community's children could be heard.

In short, cable programmers such as Court TV provide a significant amount of public interest programming, in part because doing so is in the public interest, and in part because the marketplace demands it. ^{11/} These efforts are at least the equal of, if not superior to, public interest programming offered by broadcasters, and they certainly surpass the public interest fare most DTV stations will offer, given that they will, at best, increasingly duplicate programming by their

^{10/} According to Cable in the Classroom, teachers rate Court TV as one of the best sources of educational programming out of the television and cable networks available in schools. On a scale of 1 to 100, Court TV ranked third, slightly behind PBS and Discovery, but ahead of other quality networks such as The Learning Channel, CNBC, C-Span and Mind Extension University. On a scale of 1-100, the various networks received the following ratings: PBS (89), Discovery (86), **Court TV (86)**, CNN (86), The Learning Channel (84), CNBC (84), C-Span (82), Mind Extension University (76), X-Press (50) and VISN (47).

^{11/} See, e.g., Eli M. Noam, Public Interest Programming By American Commercial Television, in PUBLIC TELEVISION IN AMERICA, 145-176, at 160-62 (Eli M. Noam and Jens Waltermann, eds., 1998) (detailing growing preference for cable programmer public interest programming over that provided by broadcast stations).

analog counterparts, including public interest offerings. Yet even if the FCC assumed that the proffered benefits of digital broadcasting somehow exceed the value of cable programming, such a preference would clearly constitute unconstitutional content-based regulation.

Any justification for elevating digital broadcasting to preferred status alongside analog signals must be found in the Act, and not in the presumed value of broadcast service. As we demonstrate below, the required statutory rationale does not exist for dual carriage of DTV and analog signals. None of the three interests identified by Congress – (1) preserving free over-the-air local broadcasting, (2) promoting widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition, *see Turner Broadcasting Sys. v. FCC*, 520 U.S. 180, 189 (1997) (“*Turner II*”) (quoting *Turner I*, 512 U.S. at 662) – are relevant to DTV must carry.

A. DTV Dual Must Carry Will Not Protect Local Broadcasters

Far from achieving a recognized statutory purpose, dual carriage would harm the marginal broadcasters the Supreme Court identified as “most in jeopardy” of losing a toehold in the market. *See Turner I*, 512 U.S. at 673 (Stevens, J., concurring) (“broadcasters who gain access” to cable systems as a result of must carry requirements “are apt to be the most economically vulnerable ones”). The Commission recognized as much when it noted that dual carriage “may result in on-air digital signals being carried, at the expense of . . . yet-to-air digital signals [not]

carried because the operator's one-third cap has been met." *Further Notice*, ¶ 119. This outcome could arise wherever a cable operator fulfills its must carry obligations by first granting access to broadcast stations it pursues of its own accord under retransmission arrangements, then makes selections from the remaining must carry stations based solely on the criteria of maximizing cable subscription. ^{12/} In such a scenario, the Commission cannot help but conclude that dual carriage would result only in the strongest stations thriving, while the weakest wither on the vine.

In recognition of this likelihood, NAB has asked the FCC to require cable operators to first carry one signal from every eligible broadcaster and then, only if must carry capacity under the one-third cap remains, offer dual carriage to some stations. NAB/MSTV/ALTV Petition for Reconsideration and Clarification at 17-18. Putting aside for the moment that the broadcasters' request has no statutory basis, it is a clear concession that (i) the long-accepted must carry purpose of protecting vulnerable stations does not, absent a rewrite of the Act, apply in the digital context; and (ii) significant capacity constraints exist that will prevent all programmers seeking access to cable systems from being carried.

^{12/} *Further Notice*, ¶ 42 ("Under the existing carriage structure, all local . . . signals that are carried, whether they have chosen retransmission consent or must carry, are counted as part of the . . . cap calculation. This . . . will continue to apply in the digital carriage context.") (footnote omitted); 47 U.S.C. § 534(b)(2) (allowing cable operators to choose, subject to certain exceptions, which stations they will

[footnote continues]

B. DTV Dual Must Carry Will Not Promote Diversity

Dual DTV carriage will not promote the widespread dissemination of information from diverse sources. First, as digital signals of broadcasters that already have analog must carry rights supplant cable programmers, the number of information sources will only shrink. Second, this exchange of one signal for another cannot even be considered a wash, because, due to FCC rules requiring an increasing amount of analog program duplication by DTV stations, ^{13/} diverse cable programming will be replaced by digital broadcast signals that are *identical* to their analog counterparts. The Commission acknowledged the loss to diversity from a dual carriage requirement when it noted the “risk that if [dual] carriage were mandated, cable subscribers would lose existing cable programming services that would be replaced on the channel line-up by [DTV] signals with less programming.” *Further Notice*, ¶ 120.

C. DTV Dual Must Carry Will Not Promote Competition or Other Public Interest Values

As detailed above, a dual must carry requirement would thwart the goal of promoting competition in the market for video programming, contrary to the

carry when the number of must-carry-eligible stations exceeds the maximum required to be carried).

^{13/} See *Further Notice*, ¶ 68 (citing *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 12 FCC Rcd 12809, 12832 (1997) (mandating that DTV stations simulcast 50% of the programming of their analog channels by April 21, 2003, 75% by the following year, and 100% the next)).

purposes of the 1992 Cable Act. To the extent the Commission believes it has identified other interests in the Cable Act that may support dual carriage, *Further Notice*, ¶ 4 (noting interests in, *inter alia*, incenting inter-industry negotiation, promoting new technologies, and hastening the DTV transition and concomitant return of auctionable spectrum), such an approach is unsupported by the constitutional analysis in the *Turner* cases. Analog must carry was upheld in the *Turner* cases by the narrowest of margins, in a decision heavily dependent on specific enunciated interests supported by congressional findings – the FCC cannot now simply substitute new interests. ^{14/} The other interests identified by the Commission, such as budget goals and hastening the DTV transition, are irrelevant to the constitutional analysis. And even if they weren't, they would hardly be advanced by a dual carriage requirement that further elevates broadcasters' preferred status vis-à-vis cable programmers. ^{15/} Whatever merits these additional

^{14/} See *Turner II*, 520 U.S. at 190-191 (refusing to include in its constitutional review any rationale “inconsistent with Congress’ stated interests in enacting must carry”); *cf.*, *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987) (both refusing to sanction must carry rules in the absence of congressional findings)

^{15/} For example, the Congressional Budget Office (“CBO”) reports that, while a strong digital must carry requirement might speed DTV transition, the transition will also be affected by a variety of other factors, including finding tower space for second antennas to broadcast new digital signals, consumer acceptance of DTV, and the absence of incentives such as spectrum fees to create non-penetration-related imperatives for transitioning from analog to digital. *Completing the Transition to Digital Television*, Congressional Budget Office, at ix-xi (Sept. 1999) (“CBO REPORT”). Given these unpredictable variables, no reliance may be placed upon dual carriage to aid DTV’s advancement. Likewise, as noted above, dual carriage

[footnote continues]

interests may have, the FCC must pursue them without intruding on cable programmer First Amendment rights. In view of the fact that dual carriage will not advance the government interests sanctioned by the Court in *Turner*, and the disfavored status that would be imposed on cable programmers, the FCC cannot justify a dual carriage requirement.

III. A DUAL CARRIAGE REQUIREMENT WOULD VIOLATE THE FIRST AMENDMENT REGARDLESS OF THE RECORD COMPILED IN THIS PROCEEDING

Court TV believes that a dual must carry requirement cannot survive constitutional scrutiny regardless of the results of any cable channel survey. *Further Notice*, ¶¶ 112-16. There can be no doubt, as the Commission has recognized, that a dual carriage requirement imposes a heavy burden on cable operator speech. *Id.* ¶ 3. As we have demonstrated herein, it would impose a heavy burden on cable *programmer* speech as well. Given that dual carriage would advance neither the statutory interests relied upon in the *Turner* cases, nor the newfound interests set forth in the *Further Notice*, a dual carriage requirement would not overcome the First Amendment infirmities it would suffer.

It is well-settled that government regulations which burden speech, as would a dual carriage requirement, are unconstitutional if they fail to substantially

will only strengthen the hand of the most powerful broadcasters. This will do nothing to advance, in the “direct and material way” the Supreme Court requires, *Turner I*, 512 U.S. at 664, inter-industry negotiation between broadcasters and cable operators, or between cable operators and independent cable programmers.

serve their asserted interests. For this reason, the Supreme Court was particularly circumspect in upholding analog must carry based solely on the interests advanced by Congress and supported by extensive legislative fact-finding. Likewise, the Supreme Court has in the commercial speech context, where the constitutional inquiry largely mirrors the intermediate scrutiny employed in the *Turner*,^{16/} invalidated speech regulations that provided only “ineffectual or remote support for the government’s purpose.” See *Greater New Orleans Broadcasting*, 527 U.S. at 188, 191-94 (invalidating ban on advertising casino gambling in part because it merely shifted gamblers between casinos rather than away from them, and the regulatory regime was “so pierced by . . . inconsistencies” the government could not “exonerate it”); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, (1995) (invalidating “unique and puzzling framework,” wherein beer labels could not contain alcohol content, but advertisements for beer and other alcoholic beverage labels could). These cases, along with *Edenfield v. Fane*, 507 U.S. 761 (1993), and *Valley Broadcasting Co. v. United States*, 107 F.3d 1328 (1995), also make clear that, the more nominally a regulation advances the government’s stated interests, the less burden there must be on the regulated party’s speech to invalidate the regulation.

^{16/} Compare *Turner II*, 520 U.S. at 189 (regulation must advance important government interest unrelated to suppression of speech and not burden substantially more speech than necessary) (citing *United States v. O’Brien*, 391 U.S. 367, 377 (1968)), to *Greater New Orleans Broadcasting Ass’n v. United States*, 527 U.S. 173, 183 (1999) (regulation must directly advance substantial government

[footnote continues]

Under these cases, a dual carriage requirement that serves neither the government interests relied upon in the *Turner* cases, nor even the new interests the FCC has (impermissibly) tacked on to those approved by the Supreme Court, would not pass constitutional muster no matter how much or how little cable system capacity the Commission's survey reveals. These Comments, as well as the discussion in *Turner II* and the limited analysis in the *Further Notice*, all demonstrate the substantial burden must carry imposes on cable operators and cable programmers. We have also demonstrated, here and in our Initial Comments, that dual carriage cannot advance any of the state statutory interests for must carry. This significant imbalance between the burden imposed on cable speech, and the benefits conferred by a dual carriage requirement, easily eclipses the mismatch between the government interests and the regulations invalidated in the *Greater New Orleans*, *Rubin*, *Edenfield* and *Valley Broadcasting* cases. In view of the anti-competitive effects dual carriage would inflict, *see supra*, Section I, it is clear that according DTV the preferential treatment dual carriage represents would result in the kind of government "restrict[ion of] speech [by] some elements of our society in order to

interest and be no more extensive than necessary) (citing *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980)).

enhance the relative voice of others,” that is “wholly foreign to the First Amendment.” *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790-791 (1978) (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)).

CONCLUSION

For the foregoing reasons, the Commission should adopt its tentative conclusion and hold that neither the First Amendment nor sound public policy allows any kind of DTV dual carriage requirement.

Respectfully submitted,

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